Sup. Ct. # 85443

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

CARMAN DECK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Jefferson County, Missouri,
23rd Judicial Circuit, Division II
The Honorable Gary P. Kramer, Judge

APPELLANT'S REPLY BRIEF

ROSEMARY E. PERCIVAL, #45292
Assistant Public Defender
Office of the State Public Defender
Capital Litigation Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106
Tel: (816)889-7699
Fax: (816)889-2088
Counsel for Appellant

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[1] Carman Deck maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

TABLE OF AUTHORITIES

CASELAW:

U.S. CONSTITUTIONAL AMENDMENTS:

SUPREME COURT RULES:

MISCELLANEOUS:

JURISDICTIONAL STATEMENT

Carman Deck incorporates the Jurisdictional Statement from page 13 of his Opening Brief.

STATEMENT OF FACTS

Mr. Deck incorporates the Statement of Facts from pages 14-28 of his Opening Brief.

ARGUMENT I

The state is wrong in asserting that the testimony was offered only to explain the officers' subsequent actions and thus was not hearsay. This was the retrial of penalty phase only, and so the state had no need to explain the basis for the officers' conduct. At any rate, the state could have supplied the jury with the necessary background information without exposing the specific content of Charles Hill's out-of-court statement, as it did at the first trial. The impermissible hearsay related directly to the key consideration for the jury – the extent of Mr. Deck's moral culpability for the crimes. It bolstered the state's case on a key point in contention, whether Mr. Deck planned to kill the victims well before he entered the house, or instead, if he decided to kill them under the pressure of the moment. This was crucial, because the penalty phase case was close, and the hearsay testimony elevated Mr. Deck from a burglar/robber who placed himself in a bad situation and then, under pressure, made an abysmal decision; to a cold-blooded killer who went to the house with a design to rob and kill. The state's other evidence on this point – that Mr. Deck had a gun and that the victims could have recognized him – was not dispositive of the issue. It was the hearsay testimony that Mr. Deck and his sister had discussed possibly killing at least one victim that impermissibly resolved the question in favor of the state.

The state argues that the testimony of Deputy Thomas was not offered for the truth that Carman Deck and his sister were planning a robbery and possible murder, but rather, just to explain the officers' subsequent conduct in investigating Mr. Deck (Resp.22-23,25). The rationale for allowing what otherwise would be inadmissible hearsay is to enable the jury to understand the events in question without speculating on the cause or reason for the officer's subsequent actions. State v. Brooks, 618 S.W.2d 22, 25 (Mo.banc 1981). Typically, the state is allowed to elicit such testimony so that the jury, in considering the defendant's guilt or innocence, will understand the officers' actions and not think that they were "out to get" the defendant or had acted unreasonably or illegally.

The court should only allow this type of testimony – which otherwise would be hearsay – to explain subsequent conduct when that conduct is actually at issue. *See* Sanborn v. Commonwealth, 754 S.W.2d 534, 541-42 (Ky. 1988). Here, Mr. Deck's guilt had already been established. This was a penalty phase proceeding only. There was no need to explain the officers' conduct. It did not matter why the officers started their search or why specifically they investigated Mr. Deck. The jury certainly did not need to know the specifics of what Charles Hill told Deputy Thomas.

Indeed, even in the prior guilt phase proceedings, the state was able to explain why the officers started their search and why they investigated Mr. Deck, without eliciting the hearsay testimony:

Q: Did [Charles Hill] also give you some information?

A: Yes, he did.

Q: Based on that information was an attempt to find an address made on some individuals?

A: Yes, there was.

Q: What address was found, if any?

A: 1230 Enderbury, Covington Manor Apartments, number ten, in St. Louis County.

Q: And whose addresses were you attempting to find?

A: Tonia Cummings and Carmen Deck.

Q: Based upon that information was any other law enforcement agency asked to assist in finding these people?

A: Yes.

(1st Tr.554-55). At the first trial, the state made its case without ever eliciting from any witness the content of Hill's out-of-court statement.

Despite the state's contentions (Resp.28-29), the closing argument shows that the state, the court, and surely, the jury, considered the testimony for the truth of the matter asserted. The state argued in closing that Mr. Deck didn't know that his sister had "spilled her guts" (*i.e*., confessed) to her boyfriend (Tr.548). The only source of this argument was Deputy Thomas' testimony that Hill told her that Mr. Deck's sister told him that she and Mr. Deck were planning to rob and possibly kill at least one victim (Tr.281-82). The court overruled defense counsel's objection that the argument was outside the evidence (Tr.548). Thus,

the court communicated to the jury that Ms. Cummings' confession to her boyfriend should be considered as substantive evidence.

The state attempts to distinguish the numerous cases cited by Mr. Deck in which relief has been granted when the state used the pretext of explaining subsequent conduct to elicit hearsay (Resp.30-35). The state argues that reversal was warranted in those cases, but not here, because in those cases (1) the state's case was weak; (2) the objectionable testimony on its face asserted a critical fact that the state needed to prove; and (3) the prosecutor used, or the jury considered, the testimony for a hearsay purpose (Resp.30-31).

But that is precisely the case here. First, the state's case for death was weak. As this Court recognized, Mr. Deck presented "substantial" evidence in mitigation in the first penalty phase. Deck v. State, 68 S.W.3d 418, 431 (Mo.banc 2002). The jury deliberated for five and a half hours at the first penalty phase (1st Tr.551-52). This time, the jury deliberated even longer, for six hours (Tr.563).

Second, the hearsay testimony related to a critical fact – Mr. Deck's character and moral culpability for the crime. The purpose of penalty phase is to provide the jury with information that permits it to make an individualized sentencing determination based on the character and record of the individual defendant and the circumstances of the particular offense. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "For purposes of imposing the death penalty, [the defendant's] criminal culpability must be limited to his participation in the [crime], and his punishment must be tailored to his personal responsibility and

moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). A criminal sentence "must be directly related to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (1987).

In determining Mr. Deck's character and personal culpability, the jury was asked to choose between two views. Was he someone who coldly planned this robbery knowing that he likely would have to kill the victims and thus deserves death? Or instead, was he someone who planned the robbery but didn't plan what would happen next, and ended up killing the victims under the heat of the moment, scared, nervous and pressured to hurry, and thus deserves life without parole?

This hearsay also impermissibly helped the state prove several of the statutory aggravators. First, it helped the state prove that Mr. Deck murdered the victims for the purpose of receiving money from the victims (L.F.216,222). That aggravator implies that Mr. Deck anticipated murder in order to effectuate the robbery, not merely as an afterthought. Second, the state used the hearsay to prove that the murders involved depravity of mind, in that Mr. Deck killed the victims after they were rendered helpless (L.F.216,222). The state repeatedly argued that the victims begged for their lives for ten minutes (Tr.547,549,552, 559); it also argued repeatedly that Mr. Deck knew before he arrived that he would kill them (Tr.560-61). The state used the hearsay to exaggerate the brutality of the crimes, by arguing that Mr. Deck knew all along he would kill the victims and just waited ten minutes to make them suffer, making the murders wantonly vile, horrible and inhuman.

Other, properly admitted evidence did not resolve the question of whether Mr. Deck planned to kill before he arrived at the house. The fact that Mr. Deck brought a gun with him showed a realization that he would need to use some force to rob the victims in their house. If he had not brought a weapon, he would have had no means to force the victims to open their safe. The fact that Mr. Deck had been at the victims house' fifteen years earlier did not mean that he realized ahead of time that they might recognize him. Nothing in Mr. Deck's confession indicated that the victims recognized him as the sixteen-year-old who had been in their house fifteen years earlier; instead, once he robbed them, Mr. Deck believed that they would be able to identify him since they had seen his face during the robbery (Ex.69). The only evidence proving that Mr. Deck contemplated murder well before he came to the house was the inadmissible hearsay testimony.

Whether or not Mr. Deck planned to kill before he arrived at the house was a huge issue. In rebuttal of closing argument, the state repeatedly argued that Mr. Deck drove to the house intending to kill:

> Remember this, defense says he didn't plan to kill 'em when he went there. What's he say in the statement? I knew they recognized me. They knew he'd been over there when he was a teenager.[2] He knew he'd broke the law.

[2] Actually, Mr. Deck stated in his confession that he realized that the victims would be able to identify him as the robber since they had seen his face, and he

> He knew they knew him. He took the gun 'cause he knew he was gonna have to kill 'em. They didn't have a chance. They did not have a chance. They were dead the second he drove up.

(Tr.560). The state continued, "He made the decision whether or not the Longs lived or died and he went ready to kill them and he carried it out fully and very efficiently, very efficiently. He made sure they would die" (Tr. 560). "He may have had a bad childhood, but it certainly doesn't cause someone *[to] go out and kill* two people when you're thirty years old. That is an excuse" (Tr. 560). "[Mr. Deck] had to plan it, had to prepare it. He had to intentionally drive all the way from the City of St. Louis to DeSoto, Missouri with a loaded handgun, after looking at the house three, four weeks before, go in just as he had planned, put the Longs on their stomachs rendering them helpless." (Tr. 561).[3]

Third, the record shows that the prosecutor used, or the jury considered, the testimony for a hearsay purpose. Although the state's closing argument did not

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never stated that the victims recognized him from their interaction fifteen years earlier (Ex.69).

[3] The state argues that "the prosecutor based his argument on the assumption that [Mr. Deck] did not decide to kill the victims until ten minutes before shooting them" (Resp., 35). This argument is refuted by the transcript, which shows that the prosecutor repeatedly stressed that Mr. Deck planned to "go out and kill" (Tr.560-61).

directly reference the hearsay testimony that Ms. Cummings had told her boyfriend that they planned to rob and possibly kill the victims, the state urged the jury to believe that there was such a plan. No limiting instruction was given. The jury was left free to consider the hearsay evidence in deciding this crucial issue. The jury was left free to consider as substantive evidence that Mr. Deck's sister stated that she and Mr. Deck would be involved in a robbery and possible murder of an elderly gentleman (Tr.281-82).

The state argues that relief should not be granted because Mr. Deck cannot prove that any error was not harmless (Resp.36). But it is the state which has the burden here. The state must overcome the presumption of prejudice by proving beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 24 (1967); State v. Miller, 650 S.W.2d 619, 621 (Mo.banc 1983). The state must prove that the jury disregarded or could not have been influenced by the evidence. State v. Degraffenreid, 477 S.W.2d 57, 64-65 (Mo.banc 1972) (overruled on other grounds); State v. Wynne, 182 S.W.2d 294, 300 (Mo. 1944).

Error in the admission of evidence "should not be declared harmless unless it is so without question." Wynne, 182 S.W.2d at 300. The state cannot meet this burden. The jury deliberated six hours (Tr.563), and the evidence in mitigation was "substantial." Deck, 68 S.W.3d at 431. The state used the hearsay throughout the trial: in opening statement (Tr.265), during Deputy Thomas' testimony (Tr.281-82,284), and in closing (Tr.548,559-61). After eliciting the hearsay testimony, the prosecutor repeated the content of the hearsay testimony in follow-

up questions to the deputy two more times (Tr.282,284). Additionally, another officer testified for the state that he went to look for Mr. Deck, "a subject that was possibly involved in a homicide" (Tr.289).[4] The testimony helped the state prove two aggravating circumstances and was crucial to the jury's overall conclusions about Mr. Deck – was he a bungling robber who didn't foresee what he was getting himself into, or was he a cold-blooded killer who robbed the victims knowing he would have to kill them?

[4] This testimony arose from the same hearsay testimony given by Deputy Thomas. The state argues that Mr. Deck has waived any error by failing to object to this testimony (Resp.37). This witness did not expressly testify regarding Mr. Hill's out-of-court statement, and thus his testimony was not as egregious as that given by Deputy Thomas. Furthermore, defense counsel's objection to the hearsay had already been overruled during Deputy Thomas' testimony; logically, counsel knew that any subsequent objection also would have been overruled, and counsel would not have wanted to draw added attention to the hearsay. The other examples cited by the state, testimony that Mr. Deck "was possibly involved in a crime" (Tr.300) and that an officer received information about "a possible home invasion" (Tr.310) are not of the same egregious nature as Deputy Thomas' testimony that Mr. Deck and his sister discussed killing the victims; counsel's failure to object to those do not waive his timely, preserved objection to Deputy Thomas' hearsay testimony.

The state argues that the record does not show that the jury relied on the hearsay in reaching its opinion (Resp.38-39). But this is not the test. The test is whether the record demonstrates that the jury actually disregarded or could not have been influenced by the evidence. Degraffenreid, 477 S.W.2d at 64-65. Furthermore, "[i]n a jury trial, when evidence is admitted that should have been excluded, this court is required to assume that the jury considered that evidence as it reached its verdict." State v. Robinson, 111 S.W.3d 510, 514 (Mo.App. 2003), *quoting* Gates v. Sells Rest Home, Inc., 57 S.W.3d 391, 396 (Mo.App. 2001).

The state argues that the jury's request to listen to Mr. Deck's audiotaped confession shows that it did not consider the hearsay for an improper purpose (Resp.35). But at trial, the state used that statement to show that Mr. Deck had planned to kill. It argued, the "defense says he didn't plan to kill 'em when he went there. What's he say in the statement?" (Tr.560). The fact that the jury listened to the statement again during deliberations meant that it was considering – at the state's urging – whether Mr. Deck planned to kill well before he arrived at the house.

Courts have repeatedly granted relief when the state uses the pretext of explaining subsequent police actions to elicit inadmissible hearsay testimony. *See* Appellant's brief, p.50-53; *see also* State v. Douglas, 2004 WL 419792 (Mo.App. W.D., 3/9/04); *also* State v. Vandeweaghe, 827 A.2d 1028, 1035 (N.J. 2003) (an officer may explain the reasons he apprehended a suspect or went to the scene of the crime by stating that he did so "upon information received"; but if he becomes

more specific by repeating what some other person told him, that testimony violates both the hearsay rule and the defendant's Sixth Amendment right of confrontation); Sanborn, 754 S.W.2d at 541-42; People v. Tanner, 564 N.W.2d 197, 199-200(Mich.App. 1997); People v. Singletary, 652 N.E.2d 1333, 1339 (Ill.App. 1995). Since the need for explaining subsequent police conduct was significantly less in this penalty phase retrial – there was no need for it at all – than there would be in guilt phase, Mr. Deck has even stronger grounds for reversal than in these other cases.

Just recently, in Crawford v. Washington, 124 S.Ct. 1354 (2004), the United States Supreme Court shored up and strengthened a defendant's Sixth Amendment right to confront and cross-examine the evidence against him. Overturning precedent, it held that the Confrontation Clause bars testimonial hearsay, unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness, regardless of whether such hearsay statements are deemed reliable by the court. *Id*., at 1365, 1369. Testimonial statements include those like Charles Hill gave to Deputy Thomas, "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*., at 1364.

This Court must follow the lead of the Supreme Court and hold the state to strict adherence of the rules against hearsay. This Court must not allow the state to winnow away the defendant's confrontation rights by using the pretext of

explaining subsequent conduct to admit inadmissible, yet extremely damaging hearsay evidence.

This Court must grant Mr. Deck a new penalty phase.

ARGUMENT II

The state's argument is faulty, because the court failed to show good cause for fully restraining Mr. Deck throughout penalty phase, failed to consider less restrictive alternatives, and failed to consider how the restraints would prejudice the jury against Mr. Deck. The state remained silent in the face of defense counsel's statements that the jury could see the restraints, and so the state cannot now complain that the record as to what the jury could see was not fully developed.

The state argues that the court had good cause to fully restrain Mr. Deck (Resp.48-49). The court's only basis was that Mr. Deck has been convicted (Tr.74). Although the state says it agrees that the decision on whether to shackle should be made on a case-by-case basis (Resp.45), it supports the court's decision to the contrary that because Mr. Deck had been convicted he automatically must be restrained (Resp.48-49).

Even caselaw cited by the state recognizes that conviction alone should not be sufficient to warrant restraints in penalty phase (Resp.45). *See, e.g.*, State v. Young, 853 P.2d 327, 350-51 (Utah 1993):

> The mere fact that a jury convicted a defendant of first degree murder is not a sufficient basis for a decision to shackle him during the penalty phase. The trial court should look at the particular facts of the case and the conduct of

the proceedings and should balance the need for safety and security in the courtroom against the potential for prejudice.

It stressed that, "[w]e believe that the conviction alone should not be sufficient evidence of violence to sustain shackling a defendant during the penalty phase, but that the trial court should look at the circumstances of the proceeding as a whole." *Id*., 351, at fn.97. There, the restraints were warranted, because the court had before it a large quantity of information regarding the defendant's violent past and uncontrollable temper in courtrooms, especially when he was labeled retarded or insane, as he would be during the upcoming penalty phase. *Id*., at 351.

Because the state knows that the trial court's basis was lacking, it attempts to draw further, unstated meaning from it. The state now argues that the full restraints were warranted because Mr. Deck knew he would either receive a death sentence, or at best, be imprisoned for the rest of his life (Resp.48-49). It argues that Mr. Deck differed from other capital defendants at this penalty phase, because other defendants have the hope of having their convictions overturned on state appeal, whereas Mr. Deck's convictions had already been affirmed (resp.48-49). The state argues that since Mr. Deck killed the victims to avoid going to prison, he posed a high risk to use the trial to attempt an escape (Resp.48-49).

These reasons were not stated by the trial court, and they are unsupported by the record. Mr. Deck showed absolutely no indication of a wish to escape and no bad conduct in the courtroom in either of his trials. Aside from the current crimes, his prior convictions had involved non-violent felonies such as burglary.

Just because his convictions had been affirmed on state appeal, Mr. Deck still had the hope of federal appeal. Any defendant convicted of first-degree murder has reasons to wish to escape, but unless there is some sort of evidence in the record that the defendant would act on that wish or would act violently or disruptively in court, he cannot be restrained.

The state insists that since there is no presumption of innocence at penalty phase, there could be no harm by shackling and handcuffing a defendant before the jury (Resp.43-45). Mr. Deck recognizes that there is no presumption of innocence in penalty phase, but the inquiry does not end there. The purpose of penalty phase is to provide the jury with information that permits it to make an individualized sentencing determination based on the character and record of the individual defendant and the circumstances of the particular offense. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). In deciding whether Mr. Deck should live or die, the jury must necessarily determine if he poses a threat of danger to his community. *See, e.g*., Simmons v. South Carolina, 512 U.S. 154, 162 (1994). The court presented Mr. Deck to the jury as someone it believed to be so dangerous that he must be fully restrained. The restraints created an ever-present risk that the jurors presumed that Mr. Deck is dangerous and therefore worthy of a death sentence. Commonwealth v. Chester, 587 A.2d 1367, 1378-79 (Pa. 1991). In a close case such as this one, the restraints impermissibly tipped the scales in favor of the state.

The state argues that Mr. Deck "seriously misapprehends" the trilogy of Supreme Court cases – Illinois v. Allen, 397 U.S. 337, 344 (1970), Estelle v. Williams, 425 U.S. 501, 503-504 (1976), and Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986) – "to the extent he argues that their holdings are not grounded on the presumption of innocence" (Resp.44). In Allen, the Supreme Court never mentioned presumption of innocence, and in Holbrook, it was mentioned just once. Mr. Deck never stated that Estelle was not grounded on the presumption of innocence. Instead, Mr. Deck stressed the principle of Estelle that viewing the defendant in prison garb or shackles would be a constant reminder to the jury of the defendant's "condition" and taint the jury's feelings about him. 425 U.S. at 504-505 (App.64-65).

The state argues that the controlling cases are this Court's decision in State v. Hall, 982 S.W.2d 675, 685 (Mo.banc 1998) and the Eighth Circuit's decision in Hall v. Luebbers**,** 296 F.3d 685, 698-99 (8th Cir. 2002). But even there, the Eighth Circuit recognized that restraints can impede a defendant's ability to participate and suggests that the defendant is guilty. *Id*., *citing* Holbrook, 475 U.S. at 569 and Allen, 397 U.S. at 344. It stressed that restraints are "inherently prejudicial" because they are "unmistakable indications of the need to separate a defendant from the community at large." 296 F.3d at 698, *citing* Holbrook, 475 U.S. at 568-69. The Eighth Circuit affirmed this Court's opinion because it recognized that the trial court had taken measures to reduce the prejudice (which is not the case here). Hall v. Luebbers**,** 296 F.3d at 698-99. When the jury was brought in for

penalty phase, Hall was already in the courtroom wearing handcuffs and shackles (in contrast, Mr. Deck was paraded before the jury in full restraints, *see* Supp.L.F.4-5). *Id*. The court removed the handcuffs at once but left the shackles, and they remained for the two to three hours that Hall was in the jury's presence (in contrast, Mr. Deck was fully restrained throughout the entire three-day proceedings, *see* Tr.74). *Id*. There was no evidence that the jurors ever saw the leg and waist shackles (here, there was, *see* Tr.74,165), or that Hall's ability to participate in the proceedings was hindered, and the immediate removal of the handcuffs ameliorated any prejudice. *Id*.

The state insists that Mr. Deck was not prejudiced by being forced to appear throughout penalty phase fully restrained, because the record did not show that the jury could see the restraints (Resp.47-48). The state makes this leap from defense counsel's comment during voir dire that "the other thing about Carman that you all either do or will know is that there's chains on him" (Tr.165). Astoundingly, the state argues that this comment suggests that the fact that Mr. Deck was shackled and handcuffed to a bellychain was not obvious to the jury (Resp.47).

In reality, the comment shows that the jurors had either already seen the restraints or would be seeing them. It indicates that the chains were readily visible once the jurors looked at Mr. Deck, as they undoubtedly had done or would do repeatedly during a three-day penalty phase trial. The jurors certainly would take many long looks at the man whose life or death was in their hands.

Additionally, defense counsel had objected earlier in voir dire that the shackling prejudiced Mr. Deck "towards the jury and it makes him look dangerous" (Tr.74; *also* 257). Neither the prosecutor nor the court disputed defense counsel's representation that the restraints were visible to the jury.

Defense counsel stated in the motion for new trial that there were numerous times when the jury clearly saw Mr. Deck – with chains, handcuffs and shackles – paraded in and out of the courtroom or standing when the judge and jury entered or left the room (Supp.L.F.4-5). At the hearing on the motion, the state did not dispute any of these facts.

The state argues that Mr. Deck failed to make an adequate record of the extent of the shackling and the jury's awareness of it (Resp.47). But the extent of the shackling was clear from the record – the judge insisted that Mr. Deck would proceed throughout penalty phase in shackles and handcuffed to a belly chain (Tr.74). The absence of any comment by either the court or the prosecutor during trial or while discussing defense counsel's motion for new trial indicates that defense counsel was accurate in stating that the shackles were visible to the jury. It is disingenuous for the state to complain now about the lack of a record when it had the chance to refute the record made by the defense yet failed to do so.

Additionally, because Mr. Deck has shown that he was unconstitutionally restrained, the burden falls on the state to show that the error was harmless. Chapman v. California, 386 U.S. 18, 24 (1967). The absence of a record as to what the jury could see cannot be held against the defendant. United States v.

Dyas, 317 F.3d 934 (9th Cir. 2003) (granting habeas relief); United States v. Parrish, 315 F.3d 1131, 1135 (9th Cir. 2003) (remanding for evidentiary hearing on what jury was able to see regarding restraints).

The state argues that Mr. Deck suffered no prejudice, because no one on the venire panel stated that they would be influenced by the restraints (Resp.47). The state completely ignores the holding of the Supreme Court in Holbrook that jurors' responses in voir dire are not dispositive of the prejudice engendered by inherently prejudicial practices like shackling. 475 U.S., at 570. "If 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' little stock need be placed in jurors' claims to the contrary." *Id.* The Court reasoned that:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.

Id., at 570. The analysis must focus on whether the risk was present, not whether the jurors could recognize the risk. *Id*.

The state suggests that the defense should have offered less restrictive alternatives to the court (Resp.48). But it is the court's duty to use the least restrictive means possible. The court, furthermore, effectively ended any

discussion regarding the restraints by its curt reply to defense counsel's entreaty for discussion: "The objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (Tr.74).

The state fails to address in any meaningful way the concerns of the United States Supreme Court that "no person should be tried while shackled and gagged except as a last resort" and that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." Illinois v. Allen, 397 U.S. at 344. It fails to address this Court's instruction that shackling in the presence of the jury should be avoided whenever possible. State v. Brooks, 960 S.W.2d 479, 491-92 (Mo.banc 1997).

The state argues that the cases cited by Mr. Deck fall into the minority view of cases nationwide, yet fails to cite any caselaw proving that its view is the majority view (Resp.49). The American Bar Association's standards show that Mr. Deck's position is the majority position:

> (c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the

defendant's right to confrontation of witnesses and consultation with counsel.

(d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards for Criminal Justice: Discovery and Trial by Jury, Standard 15-3.2 at 15-78 (3d ed.1996).

In this close penalty phase, where the jury deliberated six hours, too great a danger exists that the jury's deliberations were affected by its viewing Mr. Deck in shackles and handcuffed to a belly chain throughout the entire proceedings. This Court must grant a new trial.

ARGUMENT V

The state fails to address Mr. Deck's argument that the state used victim impact testimony that was hearsay to bolster its case for death.

The state argues that the hearsay testimony of the victims' youngest daughter, Laura Friedman, was acceptable victim impact testimony (Resp.78). Ms. Friedman testified that her daughter told her she was "very anxious about [coming to court] and very worried and concerned, scared" (Tr.399). Mr. Deck argued on appeal that the state was allowed to use this hearsay to bolster its case for death (App.Br.97).[5] The state's only response is that any child would be scared or anxious about coming to court regardless of the circumstances, and that her fear had nothing to do with encountering Mr. Deck (Resp.78).

Hearsay evidence is in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant. State v. Harris, 620 S.W.2d 349, 355

[5] Counsel for Mr. Deck inadvertently did not include the violation of Mr. Deck's Sixth Amendment rights to confrontation and cross-examination amongst the other rights listed in the Point on this issue, although she contended in the Argument that the state impermissibly used the hearsay testimony to secure death sentences (App.Br.97). To the extent that this issue is not preserved, Mr. Deck requests plain error review under Rule 30.20.

(Mo.banc 1981). The rule barring hearsay testimony protects a defendant from accusations from out-of-court declarants "who cannot be cross-examined as to the bases of their perceptions, the reliability of their observations, and the degree of their biases." State v. Brown, 833 S.W.2d 436, 438 (Mo.App. 1992). The Confrontation Clause bars testimonial hearsay unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness, regardless of whether such hearsay statements are deemed reliable by the court. Crawford v. Washington, 124 S.Ct. 1354, 1365, 1369 (2004).

The state should not have been allowed to use Ms. Freidman's hearsay testimony as to her daughter's statements to secure death sentences against Mr. Deck. Mr. Deck must receive a new trial.

ARGUMENT VI

The state's argument – that the prosecutor was merely responding to defense counsel's singular, isolated comment that Mr. Deck had but a "split second" to decide what to do – is just an excuse to flout this Court's repeated instruction to prosecutors not to engage in this specific type of argument.

> When you go back to the jury room, pick your foreperson, look at the instructions and you start talking about it. At some point would you stop and just sit there silently for ten minutes? Think about the evidence, [t]hink about Carman Deck with the gun in his hand, James and Zelma lying on the bed. Ten minutes doesn't seem long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes. … To see how long ten minutes of terror would be.

(Tr.559).

The state insists that the argument neither implied danger to the jury nor asked the jurors to place themselves in the jurors' shoes (Resp.81). It contends that the argument was a fair response to defense counsel's single, isolated comment that Mr. Deck had a split second to decide what to do (Resp.79-81). Finally, it declares that the argument simply asked the jurors to consider how long ten minutes is (Resp.82).

The state's current rationalizations cannot excuse the state's flouting of this Court's repeated instruction that urging jurors to place themselves in the shoes of a victim and then graphically detailing the crime as if the jurors were the victims, is grossly improper. State v. Storey, 901 S.W.2d 886, 901 (Mo.banc 1995); State v. Rhodes, 988 S.W.2d 521, 528 (Mo.banc 1999). Such argument is improper personalization that "can only arouse fear in the jury." Storey, 901 S.W.2d at 901; Rhodes, 988 S.W.2d at 528.

The argument here is precisely the type of argument that the Court forbade in Storey and Rhodes. By telling the jurors to think about that ten minute time span, the prosecutor directly and clearly asked the jurors to place themselves in the shoes of the victims, asking them to personally experience the victim's ten minutes of terror (Tr.559). The prosecutor asked the jurors to sit for ten minutes, and he then described in detail what the victims experienced during that time – laying on their stomachs on their bed, begging for their lives, with Mr. Deck standing above them with a gun (Tr.559).

In Storey, this Court specifically and clearly instructed that this type of argument was grossly improper. "Asking the jury to 'put themselves in [the victim's] place,' then graphically detailing the crime as if the jurors were the victims, could only arouse fear in the jury." 901 S.W.2d at 901. The prosecutor here did just that – he asked the jurors to relive the victims' ten minutes of terror and then described what those ten minutes entailed (Tr.559). Describing the details of the crime, after asking the jurors to relive those ten minutes, could only

arouse fear in the jurors. That fear was exacerbated by the fact that the court forced Mr. Deck to proceed throughout the entire proceedings in both leg irons and handcuffed with a belly chain (Tr.74). The jurors must have believed Mr. Deck to be a threat to their safety and the safety of the courtroom. The prosecutor's argument played into that fear.

In Rhodes, this Court again warned that arguments such as the one here are "condemned and uniformly branded improper, the rationale of rejection being that a juror [placing himself in the victim's shoes] would be no fairer judge of the case" than the victim herself. 988 S.W.2d at 529. The prosecutor asked the jurors to place themselves in the shoes of the victim, and then he urged them to, "[h]old your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one." *Id*., at 528. As he argued, the prosecutor physically demonstrated how the victim was murdered. *Id*. The prosecutor's goal here was the same – to have the jury re-live the victims' experience. The result, also the same – improperly instilling fear and emotion into the jury's deliberations.

The state argues that this case is similar to State v. Smith, 944 S.W.2d 901, 918 (Mo.banc 1997), State v. Roberts, 948 S.W.2d 577, 594 (Mo.banc 1997), and State v. Williams, 97 S.W.3d 462, 474 (Mo.banc 2003) (Resp.84-85). But those cases do not approach the egregious argument here.

In Smith, the prosecutor's argument described the murders from the point of view of the victims and was acceptable since it directly tracked the defendant's confession. 944 S.W.2d at 918. Although the prosecutor described what the

victims went through, he did not ask the jurors to place themselves in the victims' shoes. He did not ask the jurors to experience the victims' moments of terror.

In Roberts, the prosecutor argued that the crime affected everyone in the community, because it reduced the quality of life; argued that the defendant's execution would be much less painful than the victim's death had been; told the jurors that they would hug their children when they returned home from deliberations and would hope never to be found in the same condition as the victim; and argued that the crime was awful and that the defendant was a monster. 948 S.W.2d at 594. Again, these comments did not urge the jury to personally experience, to re-live what the victims had gone through. The comments did not ask the jurors to place themselves in the shoes of the victim.

Finally, in Williams, the prosecutor asked the jurors to imagine the fear that a witness must have felt when the defendant choked her and told her not to tell anyone about his confession to murder. 97 S.W.3d at 474. The argument, to which defense counsel failed to object, was reasonable to explain why the witness did not come forward with her story sooner and thus bore directly on her credibility. *Id*. This Court held that the prosecutor did not suggest personal danger to the jurors or use the kind of graphic detail that would prejudice the defendant. *Id*. Although the argument asked the jurors to place themselves in the witness' shoes, it did not describe the details of the crime in that context and thus was not an argument that would naturally arouse fear in the jury.

This Court has repeatedly sent the message that prosecutors may not urge the jurors to place themselves in the shoes of the victim and then describe graphic details of what the victims experienced. The question is: How many times must this Court repeat its message before it finally sinks in? Or, the obverse: How many chances will the State get to ignore the Court's clear message? Apparently, the only way that prosecutors will refrain from these arguments is to be told, in no uncertain terms, that the Court will not condone this kind of argument. The Court must be heard. It must remand this case for a new penalty phase.

CONCLUSION

For the foregoing reasons and those set forth in his initial brief, Carman Deck affirms the Conclusion set forth on page 134 of his initial brief.

Respectfully submitted,

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ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I certify that on April 19th, 2004, two copies of the foregoing and a disk containing the foregoing were delivered to the Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 7,146 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910
816/889-7699
Counsel for Appellant